IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-625

DENNIS JOHN LEWIS
a/k/a Richard Kennedy,

Petitioner,

v.

GREYHOUND LINES-EAST, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dennis John Lewis respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth in Appendix A, *infra*. The order of the United States

Court of Appeals for the District of Columbia Circuit denying the petition for rehearing and suggestion for rehearing *en banc* is set forth in Appendix B, *infra*. The opinion of the Court of Appeals is reported at 555 F.2d 1053 (D.C. Cir. 1977). The opinion and order of the United States District Court for the District of Columbia dismissing the Complaint is set forth in Appendix C, *infra*. The opinion of the United States District Court for the District of Columbia is reported at 411 F. Supp. 368 (D.D.C. 1976).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated May 12, 1977, was entered on May 12, 1977 (App. A, *infra*). A timely petition for rehearing and suggestion for rehearing *en banc* were denied on July 22, 1977. (App. B *infra*.) By order dated October 26, 1977, the Chief Justice scheduled the time for filing a petition for writ of certiorari to and including October 28, 1977. The jurisdiction of this Court is invoked and under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Whether the District of Columbia Circuit's ruling subverts the precedent of *Hines v. Anchor Motor-Freight, Inc.*, 424 U.S. 554 (1976), by freeing labor unions to substantially modify collective bargaining provisions dealing with members' disciplinary hearing rights without notifying the membership of such changes.

(2) Whether the arbitrator's award should be set aside under the teaching of *United Steelworkers of*

America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), that the arbitrator's award must both procedurally and substantively conform to the provisions of the collective bargaining agreement.

(3) Whether the arbitration award should be set aside, where the collective bargaining agreement called for a written decision of a majority of the three member arbitration board, but the award itself was signed by only one arbitrator who stated that the opinion was his sole responsibility.

STATUTE INVOLVED

The applicable statute is Section 301 of the Labor Management Relations Act, *as amended*, 29 U.S.C. § 185. (App. D, *infra*).

STATEMENT OF THE CASE

Dennis John Lewis brought this action in the United States District Court for the District of Columbia. He based jurisdiction upon section 301(a) of the Labor Management Relations Act, as amended, and alleged that Greyhound had denied him his right to a union representative at a meeting with the employer for disciplinary reasons. He alleged that Greyhound arbitrarily discharged him. Petitioner further alleged that the union breached its duty of fair representation towards him in its handling of the grievance he filed against the Company. Petitioner also alleged that the arbitrator's decision of April 28, 1975 was arbitrary and partial against the petitioner as well as being clearly outside the scope of the collective bargaining agreement.

On August 3, 1977, at approximately 7:55 A.M., five minutes before quitting time, Lewis was summoned by Greyhound City Sales Supervisor, Marion McGuffey to a disciplinary hearing at Mr. McGuffey's office. Mr. McGuffey told petitioner, who was then a night telephone information clerk, that he wanted to discuss petitioner's work performance. Petitioner, with reason to expect disciplinary action as a result of this meeting, requested the presence of his union representative. Prior to this time petitioner had been told that he was entitled to be represented by union representatives at such hearings. The supervisor, however, insisted on his immediate attendance even without a union representative. The supervisor did not inform petitioner that he was not entitled to the presence of a union representative.

Petitioner punched out at 8:01 a.m. and departed for his other job which began at 9:00 a.m. with another company. While petitioner was at the other job he received a call from Mr. Brown, the Regional Manager for Greyhound, who informed petitioner that he was not to report for work in the future until he met with Brown and McGuffey about the work related charges made by Mr. McGuffey.

From August 3, 1973 to August 6, 1973, petitioner attempted to contact his union president, David Butler, without success. On August 7, 1973, petitioner met with Mr. Butler who informed him, without having the particulars of petitioner's case, that he had no right to a union representative at the meeting demanded by Brown and McGuffey. Mr. Butler presented petitioner with a copy of a page of a document known as "The Interpretations Manual."

Petitioner was at this time informed that this was an agreement entered into by the union and Greyhound

management representatives. The page that was shown him contained a rule which stated that an employee may not have union representation in any meeting requested by management until discipline had been administered. Petitioner and other employees at Greyhound, however, were never informed of the existence of such a rule, nor even the existence of the interpretations manual by either the company or the union. Furthermore, the union and company had previously led Plaintiffs and others to believe that they had the right to union representation at the very type of meeting Brown and McGuffey had demanded.

Petitioner and Mr. Butler attempted to meet with Terminal Manager Brown on August 7, 1973, but were told that Mr. Brown was busy and would be unavailable to see them at any time that day. On August 8, 1973, the meeting with Brown and McGuffey was finally held. Although Mr. Butler was present, Brown and McGuffey would let him sit in and represent Petitioner for only part of the meeting. Mr. Butler, however, continued to adhere to his position that petitioner was not entitled to a union representative at the meeting with his employer, citing the Interpretations Manual as his authority. At the conclusion of the meeting the company's customary discharge form was delivered by Mr. Brown to petitioner. It was dated August 7, 1973, the day before the meeting.

On August 8, 1973, petitioner filed a grievance against Greyhound.[1] The grievance was heard by three

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[1] On or about October 18, 1973, petitioner spoke with Mr. Butler concerning his grievance. Mr. Butler informed petitioner that if he was unsuccessful before company representatives, petitioner could present his case before a three man arbitration board. He further advised petitioner that if this effort was unsuccessful, his

[footnote continued]

arbitrators. On April 28, 1975, arbitrator Knowlton, in an opinion signed only by him and stating that the opinion was his "sole responsibility, found that petitioner had abandoned his job because of his failure to communicate with Mr. Brown between August 3 and August 7, 1973.[2]

On December 4, 1975, petitioner filed suit in the United States District Court for the District of Columbia. On April 23, 1976, the District Court granted defendants' Motion to Dismiss, finding that petitioner had failed to state a claim for relief on the theory that there had been ill will or bad faith on the part of the union in presenting the grievance, or that the union had led petitioner to believe that National Labor Relations Board action could be filed after arbitration, causing petitioner to delay private action beyond the six month statute of limitations and that the arbitrator had correctly decided that petitioner had abandoned his job. (App. C, *infra* p.)

On May 12, 1977, the United States Court of Appeals for the District of Columbia Circuit, Judge

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case could be appealed to a two man arbitration board. He then advised petitioner that if petitioner was unsuccessful after that disposition, he could present the matter before the National Labor Relations Board.

[2]By letter to the Clerk of the United States Court of Appeals for the District of Columbia Circuit, dated July 2, 1977, counsel for Greyhound Lines-East, represented to the Court of Appeals that at some time between the arbitrator's award of April 28, 1975, and June 25, 1975, the other arbitrators signed copies of the award. Counsel did not indicate, however, whether the other members of the arbitration board concurred or dissented in arbitrator Knowlton's opinion and did not affix a signed copy of the award to the July 2, 1977, letter. Thus, there is no record of the extent to which either of the two other members of the arbitration board considered, reviewed, and adjudicated petitioner's claim.

MacKinnon dissenting, affirmed the District Court's ruling. The Court of Appeals based its affirmance of the arbitral award on its conclusion that the union had not undermined the integrity of the arbitration proceedings. (App. A, p. 1a, *infra.*)

REASONS FOR GRANTING REVIEW

A.

THE DISTRICT OF COLUMBIA CIRCUIT HAS CREATED A RULE WHICH CONFLICTS WITH DECISIONS OF THIS COURT.

The District of Columbia Circuit's ruling conflicts squarely with the precedent of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The District of Columbia Circuit's decision not only leaves standing an award tainted with procedural flaws indicating a miscarriage of justice, but also frees labor unions to substantially modify their collective bargaining agreements, while imposing no corresponding duty upon the union to inform its membership of such far-sweeping changes as modification of the members' previously existing rights in disciplinary and grievance proceedings. The panel also ignored this Court's ruling in *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. As indicated below, under *Vaca v. Sipes*, 386 U.S. 171 (1967), petitioner alleged conduct on the part of the union which was arbitrary, discriminatory, and in bad faith.

The District of Columbia Circuit's opinion, by failing to recognize that the union breached its duty of fair representation to petitioner, failed to follow this Court's ruling in *Hines, supra*. By failing to inform petitioner prior to the dispute that he was not entitled to union representation because of the alleged modification of the agreement between the union and company, the union breached its duty of fair representation to petitioner. As Judge MacKinnon correctly noted in his dissent:

> A union owes an obligation to its members, if it is to fairly represent them, to inform them of material changes in the collective bargaining agreement with employers and particularly of those changes which directly affect the rights of employees in disciplinary and grievance proceedings.

It is clear from the arbitrator's decision that the union's breach of the duty of fair representation seriously undermined and tainted the arbitration proceeding. Throughout the arbitration proceeding, the union held to its position that it had agreed with the company that a union member was not entitled to a union representative at the type of meeting demanded by appellant's supervisors where the union member had reason to believe that discipline might take place. As noted by Judge MacKinnon, the union's statement to appellant that it would not raise the fair representation issue in any proceedings before the Labor Board further evidences the Union's breach of its duty of fair representation, as well as indicating the union's "obvious conflict of interest in not stressing its *own delinquency* as the major cause of Lewis not attending the hearing." (emphasis in original), App. A, *infra* at p. 5a, *citing, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).

The District of Columbia Circuit's decision also fails to follow the teaching of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). As the majority itself acknowledged, an arbitrator's award must be set aside if there are serious "procedural flaws indicating the possibility of a miscarriage of justice." (Appendix A, *infra* at p. 2a). In this case a serious procedural flaw is present since the collective bargaining agreement called for three arbitrators, but the arbitration award was signed only by arbitrator Knowlton, who stated that the opinion was his "sole responsibility".[3] In fact the collective bargaining agreement *specifically required* a written decision of a majority of the members of the Board of Arbitration. The contract specifically provides that:

> The Board so constituted will convene immediately and weigh all evidence and agreements on the point in dispute and the *written decision of a majority of the members of the Board of Arbitration shall be final and binding upon the parties.* (Emphasis supplied)

As Judge MacKinnon's dissenting opinion correctly notes (Appendix A, *infra* at p. 6a), this error constitutes not only a serious procedural irregularity

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[3] As indicated in footnote 2 *supra*, counsel for Greyhound Lines-East indicated to the Court of Appeals that at some time between the arbitrator's award of April 28, 1975, and June 25, 1975, the other arbitrators affixed their signature to the award. Since the fully signed copy of the award was not produced by counsel, there is no indication of whether, and the extent to which, the other arbitrators concurred in arbitrator Knowlton's findings. Even assuming that the other arbitrators signed the award, the award states that the opinion is the "sole responsibility" of arbitrator Knowlton. Thus, on its face, the award contravenes the collective bargaining agreement's requirement that the board issue a "written decision of a majority of the members of the board of arbitration."

under decisions of both the National Labor Relations Board and the Circuit Courts, (*International Harvester Co.*, 138 NLRB 923, 927 (1962), *enforced sub nom, Ramsey* v. *NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964); *see also Food Handler's Local 425, Amalgamated Meat Cutters and Butchers Workers of North America, Inc.* v. *Plass Poultry, Inc.* 260 F.2d 835, 836-837 (8th Cir. 1958), but also contravenes the *United Steelworker* Court's teaching that an arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. Under *United Steelworkers*, courts must refuse enforcement of the arbitral awards "where the arbitrator's words manifest an infidelity to this obligation." *Lewis* v. *Greyhound Lines-East, et al.*, 555 F.2d 1053, 1058 (D.C. Cir. 1977) (MacKinnon, J., dissenting), *citing United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The panel's decision further breached the teaching of *United Steelworkers, supra*, in failing to recognize that the arbitrator's award additionally went outside the scope of the collective bargaining agreement in making the alleged agreed upon understanding between the union and the employer the basis of the agreement. In his opinion, the arbitrator makes mention of an agreed upon understanding between the union and the employer that employees were not entitled to have union representatives present at disciplinary hearings. At page 3 of his opinion, the arbitrator drew the following conclusion:

> "From that point on, certainly Mr. Kennedy's difficulties were completely the result of his own failure to accept these agreed upon practices and procedures."

The arbitrator's decision clearly exceeded the scope of his authority, which under the collective bargaining agreement in this case gave him no authority to "add to, nor modify the terms of the collective bargaining agreement." In relying on this "agreed upon understanding of the employer and union," the arbitrator based the essence of his decision on something clearly outside the scope of the collective bargaining agreement. The arbitrator was therefore in violation both of the standard set in the *United Steelworkers* opinion, *supra*, and in excess of his authority under the collective bargaining agreement.

Additionally, the arbitrator's award was in manifest disregard of this Court's decision in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), and therefore should be vacated. *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123 (2nd Cir. 1969). As the arbitrator recognized, *Weingarten* provides the employee with the right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres. While the arbitrator found that some disciplinary action would possibly have occurred at the initial meeting between petitioner and his employer, he ignored the applicable law and found that petitioner refused "to recognize and accept his obligation as an employee. . . ."

Accordingly, the Circuit Court erred in affirming the District Court's dismissal of the complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1583

DENNIS JOHN LEWIS
a/k/a RICHARD KENNEDY, APPELLANT

v.

GREYHOUND LINES-EAST, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 75-2039)

Submitted without argument 22 April 1977

Decided 12 May 1977

Stephen Daniel Keeffe and *Gregory M. Murad*, were on the brief for appellant.

Bernard N. Katz, was on the brief for appellee Amalgamated Transit Union. *David Bare* also entered an appearance for appellee, Amalgamated Transit Union.

Edward R. Levin and *David W. Rutstein*, were on the brief for appellee, Greyhound Lines-East.

Before: MACKINNON, ROBB and WILKEY, *Circuit Judges*

Opinion Per Curiam

Dissenting Opinion filed by *Circuit Judge* MACKINNON.

PER CURIAM: In this suit under Section 301 of the Labor Management Relations Act,[1] appellant contended that he was wrongfully discharged by Greyhound Lines-East (Employer) and that the Amalgamated Transit Union (Union) breached its duty of fair representation in the processing of his grievance. Appellant sought, among other things, to overturn the award in arbitration sustaining his discharge. This appeal is taken from the order of the District Court, granting motions to dismiss by the Employer and the Union. We affirm, largely on the basis of the opinion of the District Court (Pratt, J.).[2] Through a brief highlight of the basic issues, we would like to exemplify various points of agreement with the District Court.

The basic reason for appellant's discharge is that he abandoned his job. In brief, he refused to return to his job after being told that he must attend a disciplinary meeting with the Employer without a Union representative. After a time he located the Union President, who also told him he was not entitled to a Union representative at all possible disciplinary meetings (although the Union President did accompany appellant to all such meetings). After a discharge ensued, appellant and the Union instituted a grievance and prosecuted it through arbitration. As noted, the arbiter sustained the discharge.

We emphasize at the outset that this appeal does not call upon us to review the merits of the discharge. The collective bargaining agreement provided for arbitration

[1] 29 U.S.C. § 185.

[2] *Lewis* v. *#1 Greyhound Lines—East*, 411 F.Supp. 368 (D.C.D.C. 1976).

as the exclusive grievance mechanism; where arbitration is so specified in the collective bargaining agreement, courts must respect this and accept the award as final and binding in the absence of procedural flaws indicating the possibility of a miscarriage of justice. An award can be set aside if the union breaches its duty of fair representation in connection with the arbitration proceedings, *Hines* v. *Anchor Motor Freight*,[3] but, as the District Court properly found here, *see infra*, no breach of duty occurred. Given the absence of any procedural flaws in an arbitral award agreed by Union and Employer to be exclusive and final, it is hardly the role of an appellate court to go behind the arbiter's findings and retry this discharge complaint on the facts at this level. We thus affirm the enforcement of the finality provision as respects the arbitration here.[4]

[3] 424 U.S. 554 (1976).

[4] Even were we to reach the merits for any reason, it does not appear to us that the arbiter was arbitrary in sustaining the discharge. The arbiter essentially found that in his failure to report to work after being asked to attend a disciplinary meeting the appellant failed "to recognize the right of the Employer to reasonably control the activities of its employees. . . ." *Opinion and Award*; Appendix at 31. In other words, it is not the legitimate prerogative of the employee to disobey a supervisory order, even if he believes that his contractual rights are violated. Lewis should have gone to the supervisor's office immediately. If he deemed that action improper, he should have pursued his remedy through the established grievance procedure. Since he refused to report to work or to the meeting for a four-day period, during only one of which days, 7 August 1973, does it appear that he could not do so because a meeting with the Employer could not be arranged, Lewis' absence from work was indeed a voluntary absence and could provide basis for a lawful discharge. In addition, the arbiter found that the disciplinary meeting, which the Union President attended, turned out to be "incomplete and ineffective" due to the appellant's "atti-

As evidence that the Union breached its duty of fair representation, the appellant relied heavily upon the fact that the President of the Union told him that he was not entitled to a Union representative at the first possible disciplinary meeting. However, the statement of the Union President was based upon "an interpretations manual of the collective bargaining agreement," thus detracting, in the judgment of the District Court, from the allegations of bad faith that appellant must set out to show the breach of the Union's duty. The District Court also noted that the events in the case occurred in 1973, prior to the decision in 1975, *NLRB* v. *Weingarten, Inc.*,[5] holding lack of union representation at disciplinary meetings to be an unfair labor practice.

Appellant also denominated, as further evidence of bad faith, the Union's failure to file an action with the NLRB *after* the arbitration. (The Union pressed appellant's discharge to arbitration, where it provided counsel through two days of proceedings). The District Court very properly responded that a union does not have to advance to the NLRB every grievance of its members. It possesses discretion to pursue only those grievances it fairly considers to be meritorious. In addition, the District Court noted, appellant cannot complain of the running of the statute of limitations on the NLRB appeal since the Union disclosed its intention to challenge only the wrongful discharge, and not the representation issue.

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tude," *e.g.*, his unfounded charges of lying. According to the arbiter, appellant failed "to heed the advice of his Union representative whose intercession he had requested, when the latter attempted to handle the dispute intelligently and correctly." *Ibid.*

[5] 420 U.S. 251. Moreover, we might point out, the Board of Arbitration considered *Weingarten* and found it inapplicable, *i.e.*, appellant was provided union representation. *Opinion and Award*; App. at 31.

In sum, the District Court correctly decided not to set aside the arbitration award. Since the representation of the Union did not undermine the integrity of the arbitration proceedings, the arbitration award should be enforced as final and binding.

The order of the District Court, granting the motions to dismiss, is hereby

Affirmed.

MACKINNON, *Circuit Judge*, dissenting: Lewis complains that he was unlawfully discharged in violation of the union-company contract, a claim cognizable under section 301 of the Taft-Hartley Act.

On August 3, 1973 (a Friday), at about 7:50 A.M., ten minutes before quitting time, Lewis was summoned to his supervisor's office at the Greyhound Bus Company for a disciplinary hearing. He was told that the supervisor wanted to "discuss the quality of his work." He replied that he would not attend such meeting without the presence of a union representative. Prior to this time Lewis had been told that he was entitled to be represented by union representatives at such hearings. The supervisor, however, insisted on his immediate attendance even without a union representative. The supervisor did not inform Lewis that he was *not* entitled to the presence of a union representative.

Lewis punched out at 8:01 A.M. and departed for his other job which began at 9 A.M. with another company. Later that morning while Lewis was at his other work he received a phone call from Mr. Brown, the Regional Manager for Greyhound, who told Lewis "unless . . . he [reported] to my office at once without a union representative . . . [he] would not be allowed to return to work." *See* finding of arbitrator, App. 28. The arbitrator finds that these words, "at once" or "immediately" as used by Brown in his phone call were not necessarily intended to mean that Lewis had to leave his daytime employment and return to the terminal because it was apparently coupled with a statement that *Lewis would not be permitted to work until he had first met with Brown and that it would be necessary to make an appointment ahead of time to do so.* The arbitrator found that it could not be concluded that "it was then the intention of the Employer to do more than reassert its position that a meeting must take place at a mutually

convenient time in accordance with accepted practice." App. 29.

Over the weekend of August 4th (a Saturday) and 5th and also on August 6th, Lewis attempted to communicate with Mr. Butler, his union president, but was unable to find him at his office. On August 6th (Monday) he finally reached Mr. Butler on the telephone and on Tuesday, the 7th, he met with Mr. Butler in the morning at the Greyhound terminal and at that time an attempt was made to meet with Mr. Brown, the Greyhound representative. Mr. Brown, however, was "busy and was unable to see Mr. [Lewis] . . . at that time, but an arrangement was made for a meeting to take place on the following day, August 8th." App. 29.

The meeting finally took place on August 8th. Lewis denied the charges in strong language and *at the conclusion of the meeting* the company's customary discharge form (Form 6) was delivered by Mr. Brown to Mr. Lewis. The document was signed by Mr. Brown. *It was dated August 7th, the day before the meeting.* App. 30. Thereafter Lewis contested his discharge by filing a grievance.

This grievance was heard by three arbitrators. The arbitration award states that Lewis "abandoned his job because of his failure to communicate with Mr. Brown from August 3 through August 7" and *apparently* upheld the discharge. App. 31. The opinion admitted, however, that the basis for the action was *incomplete* because Lewis did make efforts to support his position to the extent that he had attempted to communicate with Mr. Butler.

The arbitration opinion and award recites that the arbitrators met on June 12, 1974 and February 11, 1975 but the copy thereof, that is contained in the appendix (App. 27-32), is signed *only by one arbitrator*, "Knowl-

ton" (App. 32). The lines for the signatures of the other two arbitrators state "Concurring/Dissenting" (App. 32). To what extent the other arbitrators concurred or dissented is nowhere indicated. The arbitrator's opinion and award also contains the following disclaimer:

> The following opinion is the sole responsibility of the undersigned, Knowlton. (App. 27)

The upshot was that Lewis was fired allegedly for *abandoning* his job after he had been ordered by his supervisor not to return to work until he had first met with Mr. Brown. App. 29. Following such orders from Brown he did not report for work because he was attempting to find the union officer to represent him in his hearing before Brown and some of the delay was caused by Brown's unavailability. The intervention of the weekend in August (the 4th and 5th) also made it difficult to reach his union representative. Lewis was eventually advised that under some *recent modification* of the union's agreement with Greyhound, he was not entitled to a union representative at the first such meeting. When he learned this, Lewis immediately appeared before Brown. He did, however, have a union representative.

At the hearing he was discharged *nunc pro tunc* for *abandoning his job* during the 4-day period, August 3 to August 7; that the company had told him *not* to report for work unless he had reported for the disciplinary hearing. In view of the fact that the employee had followed his superior's orders in not reporting for work, I find it impossible to support a finding that he "abandoned" his job while he was seeking his union representative to help him preserve his job. Abandonment involves an intentional act and his compliance with Brown's order is completely inconsistent with any claim that he acted

intentionally in absenting himself from work. He was industriously working at *two* jobs—hardly the sort of person that would wilfully refuse to work or intentionally "abandon" one job. Abandonment always involves a question of intention, *Columbian Insurance Company v. Ashby*, 29 U.S. (4 Pet.) 139, 143 (1830) and as Judge Johnsen stated in *Equitable Life Assurance Society v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776, 779-780 (8th Cir. 1946), "abandonment 'is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect,'" (Citing cases.) These two elements must conjoin and operate together or there is no abandonment. *Helvering v. Jones*, 120 F.2d 828, 830 (8th Cir. 1941): "Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed." *Saxlehner v. Eisner & Mendelsom Co.*, 179 U.S. 19, 31 (1900). The cases are myriad that hold both elements must coalesce before abandonment will be found to exist. 1 *Words and Phrases* 101-106 (1964). All the evidence in this record belies that Lewis had the requisite intention to abandon his job. I would thus find on the admitted facts of this record that Lewis did not "abandon" his job during the four days he was attempting to find a representative of the union to appear with him at the company-requested disciplinary hearing in his effort to help him hold his job—at the same time complying with the supervisor's order to not report for work until the disciplinary hearing had been held.

Also, it does not appear from the document in the appendix (App. 27-32) that the arbitration award had been sufficiently proved. The collective bargaining agreement provides "in discharge cases, the third arbitrator shall be instructed to issue his decision as promptly as possible . . ." App. 25. If the arbitration award filed by "Knowlton" was signed by him as the third arbitrator,

that still does not explain the absence of the signature of the other two arbitrators nor the extent to which they "concurred" or "dissented" in the opinion and award.

To summarize, it appears that Lewis was fired for "abandoning" his job when he was in reality complying with his supervisor's order not to return to work until he had reported for his disciplinary hearing. This hearing was delayed while Lewis was seeking his union representative to appear with him, only to learn when he found him that he was not "entitled" to such representation because of some modification of the agreement between the union and the company which had not been communicated to Lewis either before the dispute arose or at any time before August 8th when he did appear. The company through Butler was at fault in not informing Lewis that he was not entitled to union representation when he first stated he insisted thereon. And more so, the union was also substantially at fault for the delay in Lewis appearing for the hearing. It breached its duty of fair representation to Lewis by not informing Lewis and its other Greyhound members of the substantive change which denied them union representation at initial company disciplinary conferences. A union owes an obligation to its members, if it is to fairly represent them, to inform them of material changes in the collective bargaining agreements with employers and particularly of those changes that directly affect the rights of employees in disciplinary and grievance proceedings. This delinquency on the part of the union tainted the arbitration proceeding because the union had an obvious conflict of interest in not stressing its *own delinquency* as the major cause of Lewis not immediately attending the hearing. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976). A more vigorous advocate, untainted with being the principal cause of the reason for the employee's discharge, might have prevailed before the arbitrators.

The fact that the union told Lewis it did not plan to raise the fair representation issue in any proceedings before the Labor Board (Maj. op. p. 3), is further indication of its breach of its duty of fair representation—it could hardly be expected to raise its own failure to fairly represent Lewis as a reason for setting aside the arbitrators' award and upsetting the validity of the discharge—caused as it was largely by its own neglect.

It is true that a union possesses wide discretion to bring a member's complaint before the Board, but the exercise of that discretion is not beyond review where the interests of a union and its member are in conflict. The union was content to rest with an arbitrator's award that appears may be facially invalid. It was signed by only one arbitrator, and clearly stated that it was "the sole responsibility" of that one arbitrator (J.A. 27). This court can only rule on the record before it, and on that record, there is no explanation for the facial flaw in the arbitration opinion.

An error of this type would, at the least, constitute a "serious procedural irregularity," *International Harvester Co.*, 138 NLRB 923, 927 (1962), *enforced sub nom., Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), which, under NLRB practice, would suffice to oust any deference to the arbitration award. *See also Spielburg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955). Hence, the union could have been fairly sure of a *de novo* hearing had it taken Lewis' complaint to the Board.

Failure to object to so obvious a shortcoming could raise an inference of a breach of the union's duty of fair representation. The inducement for the union in this case not to object to the arbitration opinion might well have been that (going beyond the issue before him) the arbitrator gratuitously pointed out that "[t]he failure of [the grievance] procedure to operate effectively was

in no way due to any lack of representation by the Union . . . ." (J.A. 31). But, obviously, it was.

In my view we should reverse the District Court's decision and remand the case to determine the validity of the arbitration opinion and award and to determine the views of the other two arbitrators. This court cannot decide (at least should not decide) cases on such a sketchy record. If the arbitration award was, as is presently indicated on this record, the opinion of only one arbitrator when the contract called for three, no deference should have been accorded it by the District Court. An arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

I would also order that a hearing be held to determine the extent to which the union breached its duty of fair representation by failing to inform Lewis in advance of his disciplinary problem that he was not entitled to union representation at a first meeting with the company, and also into the responsibility of the company for Lewis' ensuing absence from work which resulted from its supervisor not informing Lewis, when he stated he desired union representation, that he was not entitled to such representation at that stage of the matter.

For the above reasons I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976
Civil Action No. 75-2039

No. 76-1583

Dennis John Lewis
a/k/a Richard Kennedy,

Appellant

v.

Greyhound Lines-East, et al.

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

Upon consideration of the suggestion for rehearing *en banc* filed by appellant Dennis John Lewis, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

/s/ Robert A. Bonner
By: Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-2039

DENNIS JOHN LEWIS,
Plaintiff,
v.
GREYHOUND LINES-EAST *et al.*
Defendants.

MEMORANDUM OPINION AND ORDER

This is a suit under the Labor Management Relations Act, 29 U.S.C. §151 *et seq.* Plaintiff, a former employee of defendant Greyhound Lines-East, is suing his employer for reinstatement and money damages for an allegedly wrongful discharge. Additionally, he sues his union, the Amalgamated Transit Union, AFL-CIO, for allegedly having breached its duty of fair representation during the formalized protest of plaintiff's wrongful discharge. Both defendants have filed motions to dismiss, which bring the matter before the Court.

The facts may be briefly stated. On August 3, 1973, plaintiff was summoned to a supervisor's office. Since he feared that the call was for disciplinary purposes, plaintiff demanded that he be permitted union representation. The request was denied, and later that day plaintiff was told not to return to work until he would agree to meet with his supervisor. For the next

three days, plaintiff attempted to contact the union president for guidance, but did not communicate with Greyhound. On August 8, 1973, plaintiff finally met with his supervisor, and was represented by union president Butler during part of the meeting. At that meeting, plaintiff's employment was terminated on the ground that he had abandoned his job.

Thereafter, plaintiff and his union instituted a grievance on the dismissal issue, which was prosecuted through aribtration. At all times plaintiff was represented either by union president Butler or by counsel. Plaintiff claims that even in the face of this representation, the union breached its duty of fair representation in two respects, hereinafter discussed.

It is appropriate at the outset to set forth the general outlines of a union's admitted duty of representation of its members. The union breaches its duty when its conduct toward any member is arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). At this preliminary stage of litigation, it is plaintiff's burden to show a threshold level of such ill-motive or arbitrary action to support his claim. *Balaowski* v. *International U., United A., A. & A. Imp. Wkrs.*, 372 F.2d 829 (6th Cir. 1967). Mere conclusory allegations, requiring the Court to infer bad faith from seemingly innocuous facts, are insufficient to meet this standard. *Lusk* v. *Eastern Products Corp.*, 427 F.2d 705 (4th Cir. 1970).

Plaintiff's first claim of breach is based on union president Butler's assertion that plaintiff was not entitled to representation at the original meeting which the supervisor sought on August 3, 1973, and which took place on August 8, 1973. Butler communicated this position to plaintiff during their first conversation,

August 7, 1973, and, as authority, cited an interpretations manual of the collective bargaining agreement. Nevertheless, Butler did participate in the August 8, 1973 meeting with Greyhound, during which plaintiff was discharged.

From these actions plaintiff would have us infer that the union did not show good faith in prosecuting the basic grievance of wrongful discharge against Greyhound.[1] To the contrary, the union relied on a formalized set of contract interpretations to determine whether plaintiff had a right to be represented at the disciplinary meeting in early August. Viewing all inferences in a light most favorable to plaintiff, it appears that he has not alleged facts sufficient to support an inference of ill-will or bad faith to state a claim upon which relief can be granted.

Plaintiff's second claim of breach is equally unavailing. He asserts that the union led him to believe that an N.L.R.B. action could be filed after arbitration, which induced him to delay a private action beyond the six-month statute of limitations. 29 U.S.C. §160(b). Both this and the refusal of the union to file an N.L.R.B. action on his behalf, plaintiff argues, is suggestive of bad faith on the union's part.

The union is not required to advance every grievance of its members. It is accorded wide latitude in determining which disputes have merit and are deserving

---

[1] Plaintiff argues that union president Butler acted in complete disregard of the applicable law of unfair labor practices. In support of that claim he cites two 1975 decisions of the United States Supreme Court, *N.L.R.B.* v. *Weingarten*, ____ U.S. ____, and *International Ladies Garment Workers' Union* v. *Quality Manufacturing Company*, ____ U.S. ____. The acts now at issue, however, occurred in 1973.

of union sponsorship. *Vaca* v. *Sipes, supra.* Thus, the mere recital that the union exercised its discretion does not, of itself, suggest hostile motive.

Moreover, undisputed facts in plaintiff's affidavit support an inference that the union had no desire to prejudice plaintiff's rights. The union made full disclosure of their intention to challenge only the wrongful discharge, and not the representation issue. Rather than attempting to lull plaintiff into a false sense of security, this notice ensured that plaintiff would take steps on his own to remedy the representation issue. That plaintiff failed to initiate such action should not now support a claim against the union. Plaintiff's claim against the union is without merit.

With respect to the claim against his employer, plaintiff's action against Greyhound for wrongful discharge has already been arbitrated, pursuant to the collective bargaining contract. The arbitor, in a proceeding at which plaintiff was fully represented by the defendant union, decided that plaintiff's claim of wrongful discharge was groundless. It is well settled that when arbitration is the exclusive grievance mechanism provided by the collective bargaining contract, as was the case here, unless plaintiff can show that union activity undermined the integrity of the arbitration proceeding, or that the arbitor acted outside the scope of the contract, the courts should not review the merits of that decision. *Hines* v. *Anchor Motor Freight, Inc.*, ____ U.S. ____ (1976); *United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Here, the union at all times met its obligation of representation, and the arbitor, having jurisdiction, correctly decided adversely to the plaintiff the question of whether plaintiff had abandoned his job.

Accordingly, it is this 23rd day of April, 1976,

ORDERED, that the motions to dismiss of defendants Greyhound Lines-East and Amalgamated Transit Union, be and the same hereby are granted, and the complaint is dismissed.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

APPENDIX D

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains

its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-625

DENNIS JOHN LEWIS,
a/k/a Richard Kennedy, *Petitioner*

v.

GREYHOUND LINES-EAST, *et al.*, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BERNARD N. KATZ
Attorney for Division 1098
Amalgamated Transit Union
AFL-CIO

Of Counsel:
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THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

QUESTION PRESENTED

The question raised is the threshold issue of whether Petitioner set forth facts sufficient to show that the Respondent Union acted discriminatorily, arbitrarily or in bad faith and, therefore, whether the Union breached its duty of fair representation.

STATEMENT

The facts of this case are adequately set forth in the Opinion of the District Court (Petitioner's Appendix C).

ARGUMENT

Actions by employees under 29 U.S.C. §185 clearly require the District Court to determine whether a union has breached its duty of fair representation in an infinite number of situations. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court set forth guidelines on the meaning of such a breach, and it has not and should not utilize its discretionary jurisdiction to review the application of those guidelines in any and all cases.

In the instant case, the courts below found that the petitioner did not make a preliminary showing of facts from which one could conceivably infer that Respondent Union's actions were arbitrary, discriminatory or in bad faith. The facts are narrow and limited to the case at hand. The fact that petitioner is unhappy with the decision does not transform the issue into one meriting the granting of a Writ of Certiorari.

There is no basis to the contention that the decision below conflicts with *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). In *Hines*, the Court was not called upon to review the lower court's finding of a breach of the duty of fair representation. The issue before the Court was

whether the employer was properly dismissed as a defendant because of the finality of the arbitrator's award despite the finding of a breach by the Union. The Court held that the employer was not properly dismissed and that a breach by the Union which taints the arbitration process permits review of the arbitration itself. The opinion of the court below that no breach by the Union occurred does not conflict with *Hines*.

There is no question that the opinion below does not conflict with *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), either. That case set forth the parameters for the court review of an arbitration award when challenged by a union. It contains no reference to the duty of fair representation, nor to conduct which amounts to a breach of that duty. Respondent Union is disinterested in Petitioner's implied and unsubstantiated contention that Petitioner can challenge the arbitration award, in the absence of a breach by the Union. If he can, the case against the Union should still have been dismissed. Errors in the arbitrator's award are not grounds for an action against the Union.

Even if a flaw in the arbitrator's award would give rise to some heretofore unrecognized cause of action against the Union, despite fair representation by the Union, the flaw petitioner alleges does not exist. The record is incomplete on this matter, as petitioner never raised the issue of the failure of all three arbitrators to sign the arbitration opinion prior to his Petition for Rehearing before the United States Court of Appeals. Only after the issue was raised in Judge MacKinnon's dissenting opinion, was petitioner heard to allege that a procedural flaw existed.

The fact of the matter is that the arbitration opinion was signed by all three members of the panel. A clerical error caused the filing of an unsigned copy with the District Court. Copies signed prior to June 25, 1975, by all three arbitrators can be provided. It is the normal practice in labor arbitration for the neutral arbitrator to write the award and opinion and for the arbitrators picked by the parties to simply affix their signature afterwards.

CONCLUSION

The decision below conflicts only with the dissenting opinion of Judge MacKinnon (Petitioner's Appendix 6A). A conflict between a majority opinion and a dissenting opinion is not very surprising and is certainly not a basis for granting certiorari.

Respectfully submitted,

BERNARD N. KATZ

IRA SILVERSTEIN

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-625

DENNIS JOHN LEWIS
a/k/a Richard Kennedy,

Petitioner,

v.

GREYHOUND LINES-EAST, *et al.*,

Respondents.

BRIEF OF RESPONDENT GREYHOUND LINES-EAST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This case presents no issue warranting further review. Contrary to the claims made in the petition, no rule has been created which conflicts with or in any way expands or diminishes decisions of this Court. The decision of the United States District Court for the District of Columbia turned upon the District Judge's application of the principles announced in the line of cases culminating with *Vaca v. Sipes*, 386 U.S. 171 (1967) and amplified in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) to the indisputed facts of record.

No new standard for proving a breach of the duty of fair representation was established by *Hines*. This Court reiterated therein the test of earlier cases that "... the burden on em-

ployees will remain a substantial one" to show that his "representation has been dishonest, in bad faith or discriminatory." In the absence of such a showing this Court goes on to point out that "[t]he finality provision [of an agreement to arbitrate disputes] has sufficient force to surmount occasional instances of mistake."

The District Court reviewed the uncontroverted facts and found that the plaintiff's [Petitioner's] burden of showing a threshold level of ill-motive or arbitrary action on the part of th Union had not been met.[1]

In affirming *per curiam* this order the Circuit Court of Appeals noted that it similarly found no evidence to support a conclusion that the Union had breached its representation duty. There is no novel issue or pronouncement of legal principle in the opinion which merits review by this Court.

Petitioner nevertheless contends that the case creates a rule allowing unions to modify collective bargaining agreements without informing its members. The record reflects no modification of the collective bargaining agreement. There was merely a set of uniform interpretations and procedures for use by all local unions operating under the same contract. The record further reflects that Petitioner Lewis (who was known during the relevant time period as Richard Kennedy) was informed of the provisions of the "National Interpretations Manual".

Petitioner has made much of his allegation that the neutral arbitrator, who is charged with responsibility (under Section 1, Article 3 (j) of the collective bargaining agreement)[2] for pre-

[1]Pet. App. 15(a). All references to Petitioners Appendix are designated "Pet. App."

[2]Res. App. A *infra at* 6a, Defendants' Exhibit "A" attached to motion for summary judgment in the district court. All references to the record contained in the Appendix filed by Respondent Greyhound are denoted "Res. App.".

paring a decision in the case, found that the grievant (Petitioner) had abandoned his job. The opinion does not rely entirely upon that finding but goes on to recite a whole series of events which in the arbitrator's view justified the employer's discharge action. Included in the findings of the arbitrator was the finding that the grievant had the assistance of a union representative "during all substantive discussion" with the employer and that such discussions were unproductive because of the grievant's failure to cooperate.[3]

Seeking to overturn the arbitration award on grounds separate from the alleged breach of representation duty, Petitioner argues to this Court that reference to a National Interpretations Manual which contained "agreed-upon practices and procedures"[4] of the Company and Union constitutes a fundamental breach of the principle that the arbitrator's award must draw its essence from the collective bargaining agreement.

The *Steelworkers* trilogy[5] made it quite clear that the arbitrator is not bound to draw the meaning of an agreement exclusively from its four corners. See *Dunau, Three Problems in Labor Arbitration*, 44 Va. L. Rev. 427 at 458 (1969).[6] As this

[3]Res. App. B. *infra at* 6b, Defendants' Exhibit "B" attached to motion for summary judgment.

[4]Res. App. B *infra at* 3b.

[5]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 St.Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

[6]The Union presented Lewis' grievance through Bernard Dunau, Esq., an able and respected attorney who was well acquainted with the issue of union representation at pre-disciplinary hearings by reason of having been counsel at that very time in the case of *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

Court stated in *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-582, 80 S.Ct. 1347 (1960):

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it."

Accord, *Gateway Coal Co. v. UMW*, 414 U.S. 368 at 379 (1974). In *United Steelworkers v. Enterprise & Wheel Car Corp.*, 363 U.S. 593, 597-598 80 S.Ct. 1358 (1960), this Court went on to further explicate the principle:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring *his informed judgment* to bear in order to reach a fair solution of a problem . . . He may of course look for guidance from many sources. . . ."

* * *

> ". . . A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. [Emphasis added]

Thus, the opinion of the Circuit Court of Appeals merely applies the teachings of this Court to a factual situation where the arbitration opinion makes passing mention of an agreed-upon interpretation of the collective bargaining agreement which the Union and the Company had adopted and which the Union had a right to adopt under *Ford Motor Co. v. Huffman*,

345 U.S. 330, 338 (1953) and *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).

In addition, Petitioner raises before this Court for the first time[7] the question of signatures of members of the Board of Arbitration or majority concurrence in the award, which states that it is the "sole responsibility of" Mr. Knowlton, the neutral member of the Board of Arbitration.

The collective bargaining agreement at Section 1, Article 3(e)[8] provides that if representatives of the two parties are unable to resolve a dispute referred to them, they shall select a third neutral arbitrator from a permanent panel and the Board of Arbitration shall convene to hear the case. Article 3(j) states:

---

[7]Petitioner never once mentioned the issue of signatures on the arbitration opinion and award in his complaint or any of the memoranda or briefs filed at any time prior to his Petition for Rehearing before the Court of Appeals. Presumably this new theory arose purely as a result of the dissenting opinion by Circuit Judge MacKinnon. The dissenting opinion of Judge MacKinnon in the Circuit Court of Appeals is relied upon heavily by Petitioner. The opinion is fatally flawed in two respects, however. First it undertakes to do precisely what this Court has prohibited in each of the *Steelworkers'* cases, *supra*, and with particular emphasis in *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 599, where it is stated that ". . . courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his".

Judge McKinnon would usurp the function of the arbitration tribunal by reviewing the case on the merits and substituting his view of the facts for that of the trier of facts. Moreover, he ignores the totality of the opinion, singling out for exception certain elements as to which he differs because of a highly legalistic approach. The *Steelworkers* trilogy teaches that arbitration is a method for resolving disputes which by its very nature will result in less legalistic approach than would result if courts were substituted for the less formalistic procedure.

[8]Res. App. B *infra at* 4a.

> "In discharge cases, the third arbitrator shall be instructed to issue his decision as promptly as possible after receipt of briefs from the parties. Briefs shall be submitted within fifteen (15) days after receipt of the transcript. In order to expedite the written decision of the third arbitrator, same may be issued prior to the written opinion explaining the decision. Executive sessions shall be discouraged, except where requested by either party to clarify language in the decision or award. If executive session is not requested within ten (10) days after receipt of the opinion, the right to an executive session is waived."

Thus, the contract contemplates that a written opinion shall come from the neutral third party. It is then to be circulated for notation of concurrence or dissent by the representatives of the adverse parties who can, if they wish, call for "executive session". It is quite understandable, since opinions are published, that a professional neutral labor arbitrator would note that the *opinion* explaining the award was authored only by him.

Petitioner further seeks review on the grounds of a serious procedural flaw – that the award was not signed by a majority of the members of the Board of Arbitration. This issue is raised by Petitioner for the first time before this Court, presumably for the sole reason that it was a subject of discussion in the dissenting opinion in the Circuit Court of Appeals. The issue is, however, completely without substance since the award was in fact signed by all members of the Board of Arbitration.

Petitioner notes in his Petition to this Court [Petition p.6 n.2; p.9 n.3] that when the issue was raised by him on a Motion for Reconsideration in the Court of Appeals counsel for Respondent herein (Appellee below) corresponded with the Clerk of the court pointing out that a copy of the award which had

been sent to the parties by Arbitrator Knowlton, but which had not been circulated for signature, had been used as an exhibit through clerical error. It was further pointed out that copies which had been signed at the time of the rendering of the award were available for clarification of the record.

Petitioner's questioning of the existence of the signed document in his petition for writ of *certiorari* suggests that he has never bothered to examine a true copy of the document over which he has vigorously litigated and requested intervention by the highest court of the land.

It goes without saying that review by this Court is inappropriate where Petitioner has wittingly remained uninformed about the essential elements of his dispute with Respondents.

This case presents, as the arbitration opinion recites, a simple situation of an employee who was unwilling to listen to or heed the advice of either his employer or his union and now seeks judicial redress for problems of his own making.

By reason of the clarity and forcefulness of this Court's many opinions in this area and of the very limited nature of the Court of Appeals' indisputably correct decision, review is unwarranted. There is no pressing need for the Court to announce once again either (1) that arbitrators, not courts, are to decide disputes subject to arbitration under collective bargaining agreements; or (2) that a Union can be held to have breached its duty of fair representation only when it is shown

to have acted dishonestly, arbitrarily, discriminatorily or in bad faith.

Respectfully submitted,

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APPENDIX

AGREEMENT

between

Greyhound Lines, Inc.

and the

National Council of Greyhound Divisions

Comprised of Divisions
1042—1043—1063—1098
1126—1150—1174—1201
1202—1203—1205—1210
1211—1238—1303—1313
1314—1315—1323—1326
1493—1500—1516

Amalgamated Transit Union
AFL-CIO CLC

Effective November 1, 1971

Expires October 31, 1974

MEMORANDUM OF AGREEMENT

THIS AGREEMENT, effective November 1, 1971, entered into by and between GREYHOUND LINES, INC., and its successors, lessees and assignees hereafter called the "Company", party of the first part, for and on behalf of its GREYHOUND LINES – WEST (CENTRAL STATES) and GREYHOUND LINES – EAST (NORTHERN AND SOUTHERN STATES) Divisions and the NATIONAL COUNCIL OF GREYHOUND DIVISIONS, comprised of Local Union Divisions 1042, 1043, 1063, 1098, 1126, 1150, 1174, 1201, 1202, 1203, 1205, 1210, 1211, 1238, 1303, 1313, 1314, 1315, 1323, 1326, 1493, 1500 and 1516 AMALGAMATED TRANSIT UNION, AFL-CIO, hereinafter called the "Union" or "Council," party of the second part.

N–Means National Common Language–Applies to all Divisions

Central States Appendix–Applies to Divisions 1126-1150-1313

Northern States Appendix–Applies to Divisions 1042-1043-1063-1098-1201-1202-1203-1205-1210-1211-1303-1516

Southern States Appendix–Applies to Divisions 1174-1238-1314-1315-1323-1326-1493-1500

This will confirm our understanding of today that the titles used either in the contract or in any proposals or agreements reached in this negotiation are for reference purposes only and such titles are not to be considered as a part of the language of the section.

This will also confirm that cross references shown below the word, "Reference," on proposals or agreements reached

in this negotiation are likewise for reference purposes only. It is further understood the economic features of this agreement are subject to approval or modification by The Federal Pay Board.

SECTION 1 – GENERAL CLAUSES – NATIONAL

N.ARTICLE 1. RECOGNITION–The Company recognizes the Union as the duly designated and sole collective bargaining representative for all employees in the occupations as set forth in the wage provisions hereof or any substantially similar occupations if the same are created in the groups and departments hereinafter referred to, except for supervisory employees with the power to hire or fire or with the right effectively to recommend hiring or firing, and agrees to meet and treat with the duly accredited officers and committees of the Union on all questions relating to hours, wages and working conditions, and agrees to deal with it as hereinafter provided.

N.ARTICLE 2. UNION SECURITY–All employees within the terms of this Agreement must become and remain members of the Union not later than the thirty-first (31st) day following their date of employment as a condition precedent to their continued employment with the Company.

N.ARTICLE 3. GRIEVANCE PROCEDURE–(a) All differences, disputes, suspensions, discipline cases and discharge cases, hereinafter collectively referred to as "Grievances" between the parties arising out of or by virtue of the within collective labor agreement, shall be disposed of as hereinafter provided in this Article. The procedure for handling employee or Union grievances shall be as follows,

(b) An employee and/or Union grievance shall be presented in writing by the employee and/or the Union representative to the supervisor designated by the Company within twenty (20)

calendar days from date of occurrence of the incident upon which the grievance is based, or within twenty (20) days from the date claim denial is received.

(c) Failing satisfactory disposition of such grievance on this level by written decision within ten (10) days from receipt of said grievance, the matter may be presented in writing within the next twenty (20) days to the Regional Manager or his representative. Within ten (10) days of receipt of said appeal, the Regional Manager will give his written decision to the appeal. The place for the Regional Manager's Hearing shall be the Home Terminal of the Employee involved unless otherwise agreed between the parties.

(d) Failing satisfactory disposition of such grievance by the Regional Manager or his representative, the Union may present the matter in writing within thirty (30) days after receipt of his decision to the President of the Company, or his representative.

(e) ARBITRATION—If such decision is not satisfactorily adjusted by written decision within ten (10) days from the date of the submission (date of receipt to govern) to the President of the Company, or his representative, the Union may within forty-five (45) calendar days, after the President's or his representative's decision, submit the issue in writing for final determination to a Board of Arbitration consisting of three persons, one arbitrator to be chosen by the Company and one by the Union. The two arbitrators shall be chosen within ten (10) days after arbitration is decided upon and they shall endeavor to reach an agreement within ten (10) days from the date the second arbitrator was appointed. Failing to reach an agreement within said ten (10) days a third arbitrator shall be chosen by the two within ten (10) days from the date of the first meeting between the two arbitrators. The third arbitrator shall be chosen from the seventeen-man permanent panel agreed to by the parties by alternately striking names until one remains and

he shall be immediately notified.

The question as to which party will strike first shall be determined by the toss of a coin. In making such submission the issue to be arbitrated shall be clearly set forth in writing. The Board so constituted will convene immediately and weigh all evidence and arguments on the point in dispute and the written decision of a majority of the members of the Board of Arbitration shall be final and binding upon the parties. The Board of Aribtration shall have no power to delete from, add to, nor modify the terms of this Agreement. The parties shall jointly share the cost of the third arbitrator and the cost of a transcript should either party desire same.

(f) In discharge cases, at the request of either party, the availability of the third arbitrator shall be determined by telephone. If an arbitrator does not have ample time available within sixty (60) days, the panel member whose name was last struck shall at the election of either party be selected as third arbitrator. The same procedure shall be followed in determining his availability, and so on, until a panel member is found who has one or two days available within sixty (60) days.

(g) Conference will be held at all levels of the grievance procedure if requested by either the Company or the Union, and in such cases the time limits applicable to the written appeal and decisions shall also be in effect. Such hearing will be held within the time limits as spelled out in (c) of this article.

(h) All arbitration decisions will be published.

(i) PERMANENT PANEL—In the event a member or members of the seventeen-man permanent panel resigns or dies, a successor or successors shall be chosen by the parties hereto in accordance with the method used in choosing the original panel. If either of the arbitrators appointed by the parties should die,

resign, or be unable or unwilling to serve, the party he represents shall appoint his successor within three (3) days after receiving such notice, without affecting the proceedings.

(j) In discharge cases, the third arbitrator shall be instructed to issue his decision as promptly as possible after receipt of briefs from the parties. Briefs shall be submitted within fifteen (15) days after receipt of the transcript. In order to expedite the written decision of the third arbitrator, same may be issued prior to the written opinion explaining the decision. Executive sessions shall be discouraged, except where requested by either party to clarify language in the decision or award. If executive session is not requested within ten (10) days after receipt of the opinion, the right to an executive session is waived.

(k) DISCIPLINE—An employee will not be disciplined or discharged, nor will entries be made against his record without sufficient cause, and in each case where disciplinary action is taken he will be given a complete written statement of the precise charges against him and the disciplinary action to be taken. Such written statement will be furnished to the employee in person, or by certified or registered mail, return receipt requested prior to the commencement of such discipline. Notification thereof shall be furnished to the local division of the Union simultaneously therewith.

(l) Disciplinary action charged on the personnel record of an employee shall be removed after a period of four (4) years from date in the event that no similar disciplinary action has been charged to such record.

(m) The Company will permit an employee or his representative, upon request, to either copy or check the service record and medical examination reports. Upon request, the Company will furnish the Union copies of said service record and medical examination reports, where Company has a copying machine

readily available and such records are not voluminous.

(APPLICABLE TO NORTHERN STATES ONLY)

(n) Letters of complaint, phone calls and complaints made in person shall not form the basis for disciplinary action involving a day or days off unless the complaint appears in person at the hearing on the Regional Manager's level.

(APPLICABLE TO SOUTHERN AND CENTRAL STATES ONLY)

(n) Where a person has made a complaint against an employee that involves discipline in excess of ten (10) days or discharge, the complainant will be produced at the Regional Manager's hearing when requested by the Union; in cases of suspension of 10 days or less, the Complainant's deposition will be taken if requested by the Union.

(o) SENIORITY: AFFECT—No discipline by suspension shall be administered any employee which shall permanently impair his seniority.

(p) When discipline is rendered or discharges are ordered, same will be done by the Superintendent (Operating or Maintenance), Regional Manager, Terminal Manager, or their assistants, however, the employees immediate supervisor may remove the employee from service, as set forth in following paragraph of the Article and may recommend to the Superintendent, Regional Manager, Terminal Manager, or their assistants, the discipline to be imposed in such cases of which he has knowledge.

(q) The Company will not suspend or remove from service any employee until the completion of an investigation and the discipline is specifically prescribed. However, any employee

may be dismissed or suspended immediately for insubordination, intoxication or dishonesty. In cases of serious accidents, no disciplinary action will be taken until the completion of the investigation; however, an operator may be withheld from active service on a standby basis until the investigation is completed. Such operators will be compensated for the time they are held on a standby basis; regular operators, their regular run pay – extra operators, earnings missed. If investigation results in an employee being dismissed or suspended for more than ten (10) days, such case may be taken directly by a representative of the Union to either the Regional Manager, or his representative, or the President of the Company or his representative, in accordance with the applicable time limits prescribed for this level of the grievance procedure.

(r) Except as provided in the next paragraph, discipline rendered shall be taken within twenty (20) calendar days after the Company's knowledge of the incident. Upon request, an additional ten (10) calendar days will be granted. Company as here used means any Greyhound bus company or company supervisor or checker.

(s) As to discipline rendered to employees on the basis of checker's reports involving improper handling of Company funds or property for which the Company is responsible, no checker's report shall form the basis for disciplinary action unless the same is made the basis of a charge within four (4) months of date of such checker's report; and the most recent checker's report shall be made within thirty (30) calendar days preceding the date of such disciplinary action.

(t) Inspectors in checking employees are to give the facts pertaining to the performance of their duties. Personal opinion of inspectors not substantiated by such facts will not be made the basis of rendering discipline.

(u) If, as a result of the appeal to the Regional Manager, or President, the discipline or the discharge is revised, or cleared, the record of the employee will be corrected accordingly and the employee will be paid for any loss of earnings in accordance with the decision rendered, plus reasonable expenses if the same were incurred as a result of such investigation or hearing having taken place at a point other than the home terminal of the employee involved.

(v) If the dispute involves discipline or discharge, the place for arbitration shall be the home terminal of the employee involved unless otherwise agreed between the parties. The place of all other arbitrations shall be agreed upon.

(w) When any issue shall arise under the provisions of this Agreement that affects the interests of the employee of more than one of the Divisions of the Union, such issue shall be arbitrated only by action and authority of the Council.

(x) COMPANY AGGRIEVED—In the event any grievance, dispute or difference originates in which the Company regards itself as the aggrieved party, the Company shall take up such matter within thirty (30) calendar days from the occurrence on which such grievance is based with the Local President in the Division in which such grievance originates. Failing satisfactory disposition of such grievance within ten (10) days from the date of such submission, the matter may be taken up by the duly designated Company representative within the next ten (10) days, with the Council of the Union. In the event no satisfactory adjustment is reached within ten (10) days after such submission, the issue may be submitted for determination to arbitration in the manner hereinabove provided for not later than thirty (30) calendar days thereafter.

(y) In each instance where time limits are set forth in the grievance and arbitration procedure and the days referred to are

not referred to as calendar days, it is understood that said time limits are exclusive of Saturday, Sunday and holidays.

1. In each instance where time limits are provided in the grievance and arbitration procedures, an additional ten (10) days will be granted if requested in writing. An extension in excess of ten (10) days will require mutual agreement.

Except issues involving contract interpretations will not be extended more than thirty (30) days without the approval of the National Interpretations Committee.

[Remaining Portions Deleted]

APPENDIX B

In the Matter of the Arbitration

between

GREYHOUND LINES – EAST — **OPINION**

– and – — **AND**

TRANSPORTATION LOCAL DIVISION 1098 — **AWARD**

Re: Discharge of Richard Kennedy

At the hearing held on June 12, 1974 and February 11, 1975 in Washington D.C. both of the above-named parties were represented. A dispute with respect to the discharge of Richard Kennedy was presented to a Board of Arbitration consisting of Fred Bowman, John Ferguson and Thomas A. Knowlton for decision.

The parties originally had intended to submit briefs subsequent to the hearings. They later agreed to limit their post-hearing statements to the entry of a Supreme Court decision which was considered by the Union to be relevant and to comment thereon.

The following opinion is the sole responsibility of the undersigned, Knowlton.

DISCUSSION

Mr. Kennedy was hired in April 1965 in the Washington, D. C. terminal. On August 3, 1973 he was employed there as a Telephone Information Clerk. He was assigned to work on the 11:30 p.m. to 8:00 a.m. shift.

At or about 7:50 a.m., *i.e.*, about ten minutes before he was scheduled off, Mr. Kennedy was the cause of some rather minor problems involving his actions at the time which in the judgment of supervisory officials, required their intervention. In general terms, it is correct to say that he was not working and that he was, at least to some extent, interfering with the work of his colleagues in the telephone answering service. It is also fair to say that, in general, everything that transpired thereafter, which finally resulted in his termination on August 8, was caused primarily by his refusal to accede to normal established practice in the terminal and his insistence upon the mistaken belief that his Employer was mistreating him and that his Union was insufficiently diligent in his behalf.

Mr. Kennedy was working at the time on a job in a newspaper office in Washington at which his hours of work were 9:00 a.m. to 5:00 p.m., Monday through Friday. A few minutes before eight o'clock, he was asked by the then Terminal Manager, Grady Brown, to accompany him to Mr. Brown's office together with another Supervisor, Mr. McGuffy. It was Mr. Brown's intention to discuss Kennedy's actions with him and seek to straighten out the matter. It is quite possible that such a meeting would have resulted in some minor disciplinary action being taken by the Employer to persuade Mr. Kennedy of the error of his ways.

Mr. Kennedy took two positions regarding this matter: first, that he would only proceed to Mr. Brown's office if he were provided with Union representation and, second, that he

insisted upon his right to leave the premises at 8:00 a.m. There was then available in the terminal at least one Union Steward, Mr. Gray. Mr. Brown was aware of an agreed-upon understanding between the parties at the time that Union representation in such an exploratory meeting was not required and he made this known to Mr. Kennedy. The meeting did not take place because Mr. Kennedy punched out at 8:01 a.m. and departed.

Sometime later that morning, while Kennedy was employed at the newspaper, he received a phone call from Mr. Brown in which, among other things, Brown told him that:

> "unless. . .he [reported] to my office at once without a Union representative. . .[he] would not be allowed to return to work."

It seems obvious to me that the words "at once" or "Immediately", as used by Mr. Brown in his phone call, were not necessarily intended to mean that Kennedy had to leave his day-time employment and return to the terminal. At least, since it was apparently coupled with a statement that Mr. Kennedy would not be permitted to work until he had first met with Mr. Brown and that it would be necessary to make an appointment ahead of time to do so, it cannot be concluded that it was then the intention of the Employer to do more than reassert its position that a meeting must take place at a mutually convenient time and in accordance with accepted practice.

From that point on, certainly, Mr. Kennedy's difficulties were completely the result of his own failure to accept these agreed-upon practices and procedures. He testified that over the weekend of August 4-5 on which he had been scheduled to work, as also on August 6, he attempted to communicate with the Union's President, Mr. Butler, but was unable to do so since Mr. Butler was not in the office. He was of course aware that there were other Union Representatives available to him and he

made no attempt to communicate with them for the purpose of arranging an early meeting. He also made no attempt, after the morning conversation with Mr. Brown on the 3rd, to communicate with the Employer.

On August 6th, he finally reached Mr. Butler on the phone. On Tuesday, the 7th, he met with Mr. Butler in the morning at the terminal and an attempt was then made to meet Mr. Brown. Mr. Brown was busy and was unable to see Mr. Kennedy at that time, but an arrangement was made for a meeting to take place on the following day, August 8th.

There were present at part or all of that meeting, Messrs. Brown, McGuffy, the Supervisor of City Sales, Kennedy and Butler. Kennedy reacted quite negatively to Mr. Brown's efforts to discuss with him those of his activities on the morning of August 3rd which were considered by Brown to be inappropriate. He accused Mr. Brown of basing his criticism on a "pack of lies. . ." and indicated that he did not believe that any explanation was due from him. Mr. Brown showed him a "Form 5 (a Disciplinary Report)" which summarized Mr. McGuffy's description of the events of the morning of August 3rd prior to Mr. Kennedy's departure, at which point Kennedy said that he was then also prepared to regard Mr. McGuffy as a liar.

There is some confusion as to whether, as Kennedy insists, he was, at the time of the meeting of August 8, already aware that the Employer had decided to terminate him through the issuance of a "Form 6" but there is no doubt that he and Butler were given Form 6 by Mr. Brown at the August 8th meeting. The document in question, the original of which was signed by Mr. Brown, bears the date of August 7th, *i.e.*, the day before the meeting. Mr. Kennedy testified that he had been shown this Form by Mr. Butler when he first met with him on August 8th and before the meeting with Mr. Brown. Mr. Butler denied having seen that document much less having had possession of it,

until after it was given to him and Kennedy at the meeting.

At the beginning of the Brown-Kennedy discussion at which Mr. McGuffy was present, Mr. Butler remained just outside the office door. A few minutes later, Mr. Butler was called in by Mr. Brown and there was a relatively short discussion during which Mr. Butler attempted to resolve the problem and Mr. Kennedy objected strenuously to what he considered to be a lack of vigor on Mr. Butler's part to uphold his position. There then followed a brief meeting between Butler and Kennedy outside the office. Mr. Butler attempted to calm Mr. Kennedy, remonstrating with him as to his attitude and telling him that if he, Kennedy, indicated a willingness to be more reasonable in his attitude and statements, the matter could be adjusted. At that point, Kennedy insisted upon an apology from Brown and McGuffy. The two men returned to Brown's office with no change in Kennedy's position. The Form 6 was handed to Kennedy and the meeting ended.

A grievance was written, protesting the discharge, as follows:

> "The action taken on Wed., Aug. 8 was unjust. The statements on my Form 6 issued today are untrue. Therefore I am appealing Mr. Brown's dismissal of me and do hereby request payment for all time lost as a result of his actions this day."

It is on the basis of this grievance, after the parties' further attempts to resolve the issue, that arbitration was required.

I find that there is nothing in the factual recitation which is set forth in Form 6 which can properly be termed either "a lie" or "incorrect." I find that a statement in Form 6, that Mr. Kennedy abandoned his job because of his failure to communicate with Mr. Brown from August 3rd through August 7th, is

correct but somewhat incomplete for the reason that Mr. Kennedy did make efforts to support his position to the extent, at least, that he attempted to communicate with Mr. Butler.

With respect to the Union's claim that Mr. Kennedy was improperly denied the representation of a Union official at a meeting between Messrs. Brown and Kennedy prior to Mr. Kennedy's termination it submitted to me a decision of the United States Supreme Court *(NLRB v. J. Weingarten, Inc.)* on February 19, 1975.

In connection with this claim of the Union I find as a fact that at the only meeting which Mr. Kennedy had with Mr. Brown prior to his discharge, Mr. Butler was present during all of the substantive discussion which, because of Mr. Kennedy's attitude, was incomplete and ineffective.

I find further that the issue here relates to the failure of Mr. Kennedy to recognize the right of the Employer to reasonably control the activities of its employees, in this case Mr. Kennedy, on the Employer's property during hours for which the employees are paid.

The grievance procedure, which in broad terms constitutes an effort to resolve disputes at as early a stage as is possible, was in this case utilized in its initial steps at the August 8th meeting.

The failure of that procedure to operate effectively was in no way due to any lack of representation by the Union at the investigative session. It failed only because Mr. Kennedy refused to recognize and accept his obligations as an employee to so comport himself as to further the purposes for which he was paid and, equally important, to heed the advice of his Union representative whose intercession he had requested, when the latter attempted to handle the dispute intelligently and correctly.

I believe on the basis of all the testimony and evidence which were adduced at the hearings, that Mr. Kennedy's grievance should be denied.

AWARD

The undersigned Board of Arbitration hereby makes the following Award:

The discharge of Richard Kennedy was proper under the terms of the parties' Collective Bargaining Agreement.

/S/ Thomas A. Knowlton
Thomas A. Knowlton

April 28, 1975

Fred Bowman
Concurring/Dissenting

John Ferguson
Concurring/Dissenting